BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia, which is not reported, is set out in (R. 248). The decision and order of the National Labor Relations Board is reported in 33 N. L. R. B. No. 58.

Jurisdiction.

The Decree of the United States Court of Appeals for the District of Columbia was entered June 29, 1942 (R. 258). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code Annotated Title 28, Paragraph 347), and under Sections 10 (e) and (f) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; United States Code Annotated Title 29 (1941 Supplement), Paragraph 151, et seq.).

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for writ of certiorari and, in the interest of brevity, are not repeated here.

The Law.

The applicable sections of the National Labor Relations Act are set forth in the Appendix to this brief.

Specification of Error.

Petitioner makes the following assignment of error which will furnish the basis for the argument in support of the allowance of the writ:

1. The United States Court of Appeals for the District of Columbia, in affirming the National Labor Relations Board, erred in ruling that the check-off cards were valid designations of the union as the bargaining representative of the signatories to the cards. The assignment of error involves the following considerations of law:

A. The validity of the check-off card as proof of the authority of the union to act as bargaining representative.

(1) On the face of the card itself.

(2) With reference to evidence adduced of an alleged usage.

B. The effect of following the doctrine of the court below.

Summary of Argument.

A. Upon the union was the burden of proving that it was the bargaining representative of a majority of the employees in the appropriate unit. Its status as such representative is dependent upon its being able to show that it was the duly designated bargaining agent of the employees. It relied upon an insufficient designation in the check-off cards, which were the sole evidence of its alleged agency.

The check-off cards do not expressly designate the union the bargaining agent. Nor do they do so by necessary inference. The essence of an agent's status is that he be empowered to affect the principal's legal relations with third persons, and the check-off cards cannot be construed as granting such power to the union.

Nor was it shown that there was any usage which was actually known, or was so notorious that it should have been known, to the signatories, making check-off cards equivalent to designations of a bargaining representative.

B. Designation of a bargaining representative under the National Labor Relations Act should be governed by the general law of agency. To permit loose standards of con-

struction will make the application of the Act confused and inefficient. Petitioner seeks only that the grant of authority be in plain, intelligible language.

ARGUMENT.

A. The validity of the check-off card as proof of the authority of the Union to act as bargaining representative.

(1) On the face of the card itself.

There is no question but that there can have been no violation of Section 8 (5) or Section 8 (1) of the National Labor Relations Act by petitioner in refusing to bargain with S. W. O. C. unless the union did in fact represent a majority of the employees in the appropriate unit.

The only proper evidence in the case upon the point of representation relates to the check-off cards. It is petitioner's contention that it is from the four corners of each check-off card that S. W. O. C. must, if at all, imply that it was designated bargaining representative. Such an implication is, it is submitted, untenable, and it is urged that it can be no more readily inferred from the check-off cards that a bargaining representative was designated than that an express appointment was made. The card is inoperative for the purpose advanced by the union.

The employer is charged with the duty of granting exclusive recognition to the majority's representative. The National Labor Relations Act is silent upon the nature of the designation which is required, and to clarify and settle the questions with reference thereto, the extent and limits of the required authority should be defined. Under Section 7 of the Act employees have the right to bargain collectively through representatives of their own choosing. It needs no citation to show that in acting through a representative the employee has designated an agent to act for him. The

word agent is synonymous with representative, and the assimilation of the two words in connection with the Act is in consonance with their general application: See *Torres* v. *Lothrop*, 231 U. S. 171, 181, 34 S. Ct. 108, 58 L. Ed. 172 (1913). As will be shown hereafter in this Brief, it is functionally important that the rules of agency be applied to the case at bar, and that the matter is more than one of mere terminology. It is necessary, therefore, to analyze the content of the check-off cards to determine wherein they fall short of the creation of an agency.

The Restatement of Agency, Sec. 1, defines agency as

> "* * * the relationship which results from the manifestation of consent by one person that the other shall act on his behalf and subject to his control, and consent by the other so to act."

In less precise language Mechem on Agency (2nd Ed. 1914), Sec. 25, says that the word agency indicates the relation which exists when one person is employed to act for another. In Section 26 Mechem says:

> "The relation of principal and agent, or the relation of agency in the narrower sense in which it is chiefly employed in this work, is the legal relation which exists where one person, called the agent, is authorized—usually by the act of the parties, but occasionally perhaps by operation of law to represent and act for another, called the principal, in the contractual dealings of the latter with third persons. The distinguishing features of the agent may briefly be said to be his representative character and his derivative authority."

Indicative of the consequences of the relationship is the fact that

> "An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself."

Restatement of Agency, Sec. 12
Comment a. to Section 12 reads:

> "The words 'power of the agent' denote the ability of an agent or apparent agent to affect the legal relations of the principal in matters connected with the agency or apparent agency. The exercise of this power may result in binding the principal to a third person in contract. * * *"

The agent, if sufficiently authorized, may make agreements binding upon his principal. Unless he is deemed to be able to exercise this power he cannot be an agent. Implicit in the concept of agency is the consent of the principal that the agent shall represent him in the stated transaction. Section 7 of the Restatement of Agency reads as follows:

> "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."

There is, of course, no disposition on the part of petitioner to declare that the evidence of agency, whether written, oral or of conduct (See Restatement of Agency, Sec. 26), need be express. There are conceivably many situations where the interpretative function of a court is brought into play. Nevertheless, there must be some solid basis, if the authorization is not explicit, from which an agency can be inferred. There is, except in a few cases not here important, no presumption of agency in the law; it is a fact to be proved, and the person alleging it must prove it by a preponderance of the evidence: Mechem on Agency (2nd ed. 1914), Sec. 255; Wigmore on Evidence (3rd ed. 1940), Sec. 2520 (c), which says:

> "The authority of an agent, purporting to execute for his principal, is not presumed."

And

> "Whether a certain writing or a series of writings creates an agency or not, and if so, what is the nature and extent of the power conferred, the writing being produced, and being couched in such terms as to require no aid from extrinsic evidence, are questions of law for the decision of the court."
>
> Mechem on Agency (2nd ed. 1914), Sections 294, 295; Restatement of Agency, Sec. 32.

The authority of an agent, insofar as his relation to his principal is concerned, may be either express or implied: Mechem on Agency (2nd ed. 1914), Sec. 707. The Restatement of Agency, perhaps more grammatically, calls "implied authority" "inferred authority" and distinguishes it from the other traditional category, apparent authority.

Express authority and implied authority are both actual authority, and are founded upon the principal's directions or conduct toward his agent.

> "Implied agency is actual agency, and the difference between it and express agency is mainly one of the method of proof * * *."
>
> Dobbs v. Zink, 290 Pa. 243, 247, 138 A. 758 (1927). See also 2 C. J. S. 1050 f. n. 18.

Certainly in the instant case the alleged authority cannot be called express. Nor, obviously is it necessary to consider it under the heading of apparent authority. The sole problem is whether the union was actually authorized to act as the agent of the signatories to the cards. Nor is "incidental authority" to be given any weight. The last named is the "authority to do all those incidental acts, naturally and ordinarily done in such a case, which are reasonably necessary and proper to carry into effect the main power so conferred": Mechem on Agency (2nd

ed. 1914), Sec. 242. Manifestly, for incidental authority to be operative there must be some prior and indisputable grant of authority to call it into being. In the case at bar it is this grant of authority which we are seeking by an examination of the check-off cards.

The check-off card is entitled "Wage Deduction Authority". It is addressed ostensibly to the paymaster, but custody was entrusted to the union. The authority (i. e., the authority to deduct dues) was to be effective during the life of the "agreement", and automatically cancellable "when the labor and working agreement between your company and the S. W. O. C. terminates." (The alternative form is similar.) It is submitted that the card cannot be viewed as granting to the union *the power of affecting the signatory's legal relationship with the company by the execution of an agreement referred to,* the *sine qua non* of agency, as the above discussion shows. In no way can it be inferred that the signatory agreed to abide by the terms of the " agreement". That the agreement is mentioned in the card merely makes the authority of the paymaster to deduct possible dues dependent and contingent upon the execution of an agreement. It sets a time upon and during which the authority of the paymaster is to exist. It creates no agency in the union to negotiate an agreement for and on behalf of the signatory; the card in issue did not, in express terms or by reasonable inference, make the "agreement" (as yet in future) binding, when executed, upon the employee. *Certainly an employer is not to be burdened with the obligation of bargaining and executing an agreement with a purported agent, when there is no assurance that the agreement will "stick".* It may be granted, perhaps, that there would be some measure of ratification of an agreement not previously authorized if the employee should eventually permit a check-off without protest; it is not, however, the signing of the check-off card which could

be thought to found the agency, but the non-exercise of the power, by the employee, to revoke the authority of the paymaster to deduct $1.00 from his monthly wages.

Petitioner has not been captious in its interpretation of the check-off cards (Board's Exhibits 5A-1 to 337 (R. 137-138), though there is no qualification of the potential deductions—they are not called union dues, but are to be sent to the union secretary, according to the cards. It is submitted that the defect in the cards, from the standpoint of creating an agency, is so basic and fundamental that even the express designation of the possible future deductions as union dues in the other form makes no difference.

Counsel has been able to find no court opinion which has passed upon the precise problem of the present case. In all cases heretofore decided by the courts, in which the sufficiency of cards as a means of designation was raised, the cards evidenced a *present* intention on the part of the signers to become members of the union. (See cases cited by majority opinion in court below on Page 5 of its printed opinion.) While actual membership by an employee in a union may not be necessary for the union to represent him in collective bargaining, it is submitted that it is essential that there be an inescapable and present designation of the union as a bargaining agency; this requirement is not met by the check-off cards. Where there is actual membership in the union there is no problem at all; similarly, an application for membership is also sufficient, on the ground it evinces a present desire that the union represent the applicant, which the union is authorized to fulfill without doing violence to the general principle of agency law that if the agent proceeds to act under the appointment it is unnecessary to give the principal express notice of acceptance, if he proceeds to act within a reasonable time: See 2 C. J. S. 1044.

(2) With reference to evidence adduced of an alleged usage.

Petitioner was placed in the position of deciding, at its peril, whether or not the union was the agent of a majority of the employees. There is no sufficient evidence in the record to prove the existence of any usage or custom insofar as the union and its negotiations with other employers are concerned, and there is no evidence to prove any knowledge, real or constructive, of such a usage or custom on the part of petitioner and its employees. See (R. 130).

In the majority opinion it was decided that the cards themselves evidenced a sufficient grant of authority, and that in view of the usage and custom, the intent of the cards becomes inescapable. Associate Justice Stephens clearly points out that the testimony fails to establish a definite usage generally adopted, and that apart from such inadequacy, there was no testimony that any usage or custom was brought home to the signatories of the cards, whether because of actual knowledge, or because the usage or custom was so notorious that the employees must have known of it. The citation, in the minority opinion, of 3 Williston on Contracts (Rev. ed. 1936), Sections 648, 649, and especially 661 is pertinent.

On both counts the check-off cards are insufficient. Alone they grant no authority to bargain, nor are they supplemented by any established usage.

B. The Effect of Following the Doctrine of the Court Below.

The question raised in this case is of general importance in the construction and application of the National Labor Relations Act. The preamble (Sec. 1) of the Act (29 U. S. C. A. Sec. 151) states that one of its purposes is the removal of certain recognized sources of industrial strife and unrest,

by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees—in short, collective bargaining.

The only basis upon which successful and efficient collective bargaining can be predicated is the establishment of definite and specific rules governing the employer's duty and the union's right to bargain. If the present decision of the court below and the loose standards it sets are to remain the law, both employers and employees will be in the position of attempting to adjust fundamental and important rights without a definite guide as to what constitutes and what does not constitute a representative for the purpose of bargaining. The Act itself is silent upon the subject, but it is submitted that collective bargaining can be encouraged only if the rules governing the designation of representatives should follow the general rules of agency law. Should courts be permitted to range far afield without reference to the traditional yet entirely adequate and adaptable principles of the law of principal and agent, there will be confusion in the application of the Act. Courts given to what to them seems a liberal, or lax, construction, will fix a standard in line with their policies, while courts applying strict standards of construction will arrive at a contrary result, so that a process which should be orderly and effective will become confused and difficult in its operation.

To permit a fundamental feature of the Act to be rendered uncertain by allowing the construction of documentary or other evidence as proof of authority in as facile a manner as the court below is to promote industrial strife rather than to obviate it, in the very teeth of the Act (See *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 326, 60 S. Ct. 918, 84 L. Ed. 1226 (1940)). It is not that petitioner contends, as the majority opinion in the court below thought,

that any technical formula is necessary to designate a bargaining representative, any more than such formality is necessary to appoint an agent in all but a few special instances (See Restatement of Agency, Sec. 26). However idiosyncratic the general vocabulary of labor is, there is no magic in mere peculiarity which would enable a court to construe the check-off cards as conferring a power to bargain. The logic is askew—labor speaks unintelligibly, the check-off cards do not have any intelligible bearing upon the question, therefore the signers must have intended to designate a representative. It would be far better to formulate a standard which will require labor to speak intelligibly to third parties, no matter how cabalistic may be its speech within the fold. Petitioner seeks no more rigid a ruling than that the "representative" show in plain or understandable language that it is authorized. Construction of the Act in the light of the general law of agency, so far from encasing it in an alien and unsocial inflexibility, will render it more workable.

Furthermore, there is no more reason why an employer should be obliged to *guess* whether an alleged representative is duly authorized to bargain for a binding agreement, than there would be to force him to guess as to comparably important claims, which can as easily be evidenced by definite proof. One seeking to bargain should display its badge of authority with reasonable clearness. To saddle the employer with the hazards attendant upon a bona fide but mistaken guess is unfair. Once it is laid down by the highest court that the designation of a representative must be couched in terms plainly referable to the purpose, a source of confusion will be removed. The energies of the parties will be saved for the actual bargaining, and will not be wasted upon preliminary haggling; nor, if the employer is timorous, will he be precipitated into bargaining with a representative without portfolio.

And it should not be forgotten that under Section 10 (f) of the Act the United States Court of Appeals for the District of Columbia has the right to review cases under the Act arising in all states of the Union, and that therefore its decisions in matters of construction and application of the Act have nationwide significance.

Conclusion.

It is accordingly submitted that the petition for certiorari should be granted.

Respectfully submitted,

H. Rank Bickel, Jr.,
Clarence D. Becker,
H. P. McFadden,
Counsel for Petitioner.

